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TWELFTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

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Addendum

Articles in order

1. The Commission observed that the articles were not presented in order and that the various partial numberings of the articles adopted by the Drafting Committee, together with the proposed articles (designated by letters) for the chapter on liability, could give rise to confusion. This report endeavours to review what has been done thus far and number the articles consecutively.

2. The Commission sent to the Drafting Committee the first 10 articles of the draft, which included two different versions of chapters I (General provisions) and II (Principles): one is that of the fourth report, 1/ and the other is that of the fifth report. 2/ This set of articles does not present a problem in terms of renumbering, because the articles deal with the same content in both versions, although their wording differs.

3. Thus far, the Commission has adopted a number of articles, which will be presented without brackets in the version below. Those adopted in relation to

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1/ Yearbook ... 1988, vol. II (Part One), p. 251 (A/CN.4/413).

2/ Yearbook ... 1989, vol. II (Part One), p. 131 (A/CN.4/423).

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liability may be numbered consecutively (beginning with article 21) following the last transcribed article.

4. Articles

Chapter I. GENERAL PROVISIONS

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "Risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

[(d) Definition of "affected State" (fourth and fifth reports)] 3/

[(e) Definition of "preventive measures" (tenth or eleventh report, 4/ depending on the Commission's decision)]

3/ In the fourth report, the proposed text is as follows: "'Affected State' means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected". In the fifth report, the text is as follows: "'Affected State' means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment, are or may be appreciably affected".

4/ A/CN.4/468.

[(f) Definition of "harm" (eighth report, 5/ appendix, section C), including environmental harm (eleventh report)]

[(g) Inclusion of the cost of ex post preventive measures as part of reparation for harm]

[Article 3]

[Attribution (fourth report)]

[Assignment of obligations (fifth report)]

[Conditions for the assignment of the obligations imposed by the present articles (fourth and fifth reports)] 6/

5/ Yearbook ... 1992, vol. II (Part One) (A/CN.4/443).

6/ The version contained in the fourth report, under the heading "Attribution", reads as follows:

> "The source State shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried out in areas under its jurisdiction or control."

In the fifth report, under the heading "Assignment of obligations", the text is as follows:

> "The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.
>
> "Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph."

[Article 4]*

[Relationship between the present articles and other international agreements]

[Relationship between the present articles and other international agreements to which the States Parties to the present articles are also parties concerning the activities referred to in article 1 (fourth and fifth reports)] 7/

[Article 5]*

[Absence of effect upon other rules of international law]

[Application of other rules of international law to transboundary injury arising from wrongful acts or omissions of the State of origin not specified in the present articles (fourth and fifth reports)] 8/

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* The Commission may decide not to include these two articles, bearing in mind that it does not normally include final provisions in the draft articles it produces.

7/ The version contained in the fourth report, under the heading "Relationship between the present articles and other international agreements", reads as follows:

"Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply, subject to that other international agreement."

The version contained in the fifth report, under the same heading, is as follows:

"Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement."

8/ Under the same heading referred to in this paragraph, the text in both reports reads as follows:

"The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law".

Chapter II. PRINCIPLES

Article 6 (article A adopted in 1995)

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article 7 (article B adopted in 1995)

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Article 8 (article C adopted in 1995)

Liability and reparation

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article 9 (article D adopted in 1995)

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

[Article 10]

[Non-discrimination]

[States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1.]

Article 11

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 14

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis*

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

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* It would be preferable to place this article with those dealing with principles.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.*

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk or has caused it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

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* If the Commission adopts a regime of liability for acts not prohibited, it will have to change the wording of this paragraph to include remedial measures.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) The degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) The economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) The degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) The standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.